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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MARIANO BENITEZ , individually) Case No.
and on behalf of all others similarly)
situated,	) <u>CLASS ACTION</u>
)
Plaintiffs,	) COMPLAINT FOR VIOLATIONS
	) OF:
vs.)
	) 1. NEGLIGENT VIOLATIONS OF
	) THE TELEPHONE CONSUMER
	) PROTECTION ACT [47 U.S.C.
MOMENTUM CAPITAL GROUP,	) §227 ET SEQ.]
LLC , and DOES 1-10, inclusive,	) 2. WILLFUL VIOLATIONS OF THE
	) TELEPHONE CONSUMER
	) PROTECTION ACT [47 U.S.C.
Defendant.	) §227 ET SEQ.]
)
	) <u>DEMAND FOR JURY TRIAL</u>

Plaintiff, MARIANO BENITEZ ("Plaintiff"), on behalf of himself and all others similarly situated, alleges the following upon information and belief based upon personal knowledge:

INTRODUCTION

1. Plaintiff brings this action for himself and others similarly situated seeking damages and any other available legal or equitable remedies resulting from the illegal actions of MOMENTUM CAPITAL GROUP, LLC ("Defendant"), in negligently, knowingly, and/or willfully contacting Plaintiff on Plaintiff's cellular

1 telephone in violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227,
2 *et seq.* (“TCPA”), thereby invading Plaintiff’s privacy.

3 2. The TCPA was designed to prevent calls and messages like the ones
4 described within this complaint, and to protect the privacy of citizens like Plaintiff.
5 “Voluminous consumer complaints about abuses of telephone technology – for
6 example, computerized calls dispatched to private homes – prompted Congress to
7 pass the TCPA.” *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 744 (2012).

8 3. In enacting the TCPA, Congress intended to give consumers a choice
9 as to how creditors and telemarketers may call them, and made specific findings
10 that “[t]echnologies that might allow consumers to avoid receiving such calls and
11 messages are not universally available, are costly, are unlikely to be enforced, or
12 place an inordinate burden on the consumer. TCPA, Pub.L. No. 102–243, § 11.
13 Toward this end, Congress found that

14
15 [b]anning such automated or prerecorded telephone calls to the home,
16 except when the receiving party consents to receiving the call or when
17 such calls are necessary in an emergency situation affecting the health
18 and safety of the consumer, is the only effective means of protecting
telephone consumers from this nuisance and privacy invasion.

19 *Id.* at § 12; see also *Martin v. Leading Edge Recovery Solutions, LLC*, 2012 WL
20 3292838, at* 4 (N.D.Ill. Aug. 10, 2012) (citing Congressional findings on TCPA’s
21 purpose).

22 4. Congress also specifically found that “the evidence presented to the
23 Congress indicates that automated or prerecorded calls are a nuisance and an
24 invasion of privacy, regardless of the type of call....” *Id.* at §§ 12-13. See also,
25 *Mims*, 132 S. Ct. at 744.

26 5. In a recent decision, the Supreme Court interpreted the term
27 “automatic telephone dialing system” and held that “[t]o qualify as an ‘automatic
28 telephone dialing system,’ a device must have the capacity either to store a

1 telephone number using a random or sequential generator *or* to produce a telephone
2 number using a random or sequential number generator.” *Facebook, Inc. v. Duguid*,
3 141 S.Ct. 1163 (2021) (emphasis added).

4 6. In *Duguid*, the Supreme Court provided an example of such systems,
5 stating: “For instance, an autodialer might use a random number generator to
6 determine the order in which to pick phone numbers from a preproduced list. It
7 would then store those numbers to be dialed at a later time.” *Id.* at 1171-72 fn. 7.

8 7. Further, both *Duguid* and the legislative history of the TCPA are clear
9 that the original focus on prerecorded voice technology prohibition was the fact
10 that such communications involved agentless calls, not on the question of whether
11 a literal voice was used during those agentless calls. *See* Hearing Before the
12 Subcommittee on Communications of the Committee on Commerce, Science and
13 Transportation, United States Senate One Hundred Second Congress First Session
14 July 24, 1992, Testimony of Robert Bulmash and Steve Hamm at pg 11; 7 FCC
15 Rcd. 8752 (F.C.C. September 17, 1992).

16 8. The Sixth Circuit has also recognized this distinction: “Congress drew
17 an explicit distinction between ‘automated telephone calls that deliver an artificial
18 or prerecorded voice message’ on the one hand and ‘calls place by ‘live’ persons’
19 on the other.” *Ashland Hosp. Corp. v. Serv. Employees Int’l Union, Dist. 1199*
20 *WV/KY/OH*, 708 F.3d 737,743 (6th Cir. 2013).

21 9. Similarly, the FTC has observed that “prerecorded calls are by their
22 very nature one-sided conversations, and if there is no opportunity for consumers
23 to ask questions, offers may not be sufficiently clear for consumers to make
24 informed choices before pressing a button or saying yes to make a purchase.” 73
25 FR 51164-01, 51167 (Aug. 29, 2008).
26
27
28

1 **JURISDICTION & VENUE**

2 10. Jurisdiction is proper under 28 U.S.C. § 1331 because this action
3 arises under a federal statute, namely the Telephone Consumer Protection Act, 47
4 U.S.C. § 227, *et seq.*

5 11. Venue is proper in the United States District Court for the Central
6 District of California pursuant to 18 U.S.C. § 1391(b) because a substantial portion
7 of the events and omissions giving rise to Plaintiff's claims occurred within this
8 District.

9 **PARTIES**

10 12. Plaintiff, MARIANO BENITEZ ("Benitez") is natural person residing
11 in Los Angeles County, California, and is a "person" as defined by 47 U.S.C. §
12 153(39).

13 13. Defendant, MOMENTUM CAPITAL GROUP, LLC ("Defendant"),
14 is a limited liability company of the State of Florida, which conducts business
15 within this District, and is a "person" as defined by 47 U.S.C. § 153(39).

16 14. The above named Defendant, and its subsidiaries and agents, are
17 collectively referred to as "Defendants." The true names and capacities of the
18 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
19 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
20 names. Each of the Defendants designated herein as a DOE is legally responsible
21 for the unlawful acts alleged herein. Plaintiff will seek leave of Court to amend the
22 Complaint to reflect the true names and capacities of the DOE Defendants when
23 such identities become known.

24 15. Plaintiff is informed and believes that at all relevant times, each and
25 every Defendant was acting as an agent and/or employee of each of the other
26 Defendants and was acting within the course and scope of said agency and/or
27 employment with the full knowledge and consent of each of the other Defendants.
28

1 Plaintiff is informed and believes that each of the acts and/or omissions complained
2 of herein was made known to, and ratified by, each of the other Defendants.

3 FACTUAL ALLEGATIONS

4 16. On or about August 3, 2019, Defendant contacted Plaintiff on his
5 cellular telephone number ending in -7919 using a pre-recorded voice message, in
6 an effort to sell or solicit its services.

7 17. At the time of Defendant's initial call to Plaintiff, Plaintiff's cellular
8 telephone number ending in -7919 had been on the National Do-Not-Call Registry
9 for more than thirty days.

10 18. Plaintiff received at least five (5) more calls from Defendant,
11 including two pre-recorded voice calls on or about August 30, 2019, and pre-
12 recorded voice calls on October 18, 2019, and November 2, 2019.

13 19. Defendant also sent Plaintiff text messages, including on or about
14 August 30, 2019.

15 20. Defendant's text message read:

16 PRE-APPROVED: Private
17 Lender Offers to 975K to Small
18 Bizs. 95% Approved. Bad
19 Credit OK. Funds Same/Next
20 Day. Consolidates. Go b.link/
Capital34 Rply STOP 2 quit

21 21. Based on the content and format of Defendant's text messages,
22 Plaintiff alleges that they were sent via Defendant's SMS Blasting Platform, i.e.,
23 an "automatic telephone dialing system," ("ATDS") as defined by 47 U.S.C. § 227
24 (a)(1).

25 22. The text message sent to Plaintiff's cellular telephone was not sent by
26 a live agent and thus created a one-sided conversation in which Plaintiff could not
27 receive a response to his questions and/or concerns. The text message also was sent
28 in an automated fashion as a result of computerized campaigns that were pre-
programmed in advance to send messages out to large groups of consumers all at

1 once, either sequentially or via algorithmic dialing, i.e. in an automated fashion by
2 a computer.

3 23. In Merriam Webster's Dictionary, "voice" is defined as "an
4 instrument or medium of expression." It defines "artificial" as "humanly
5 contrived...often on a natural model : MAN-MADE" and "lacking in natural or
6 spontaneous quality."

7 24. The messages sent to Plaintiff by Defendant using the SMS blasting
8 platform employed a text message as an instrument or medium of expression to
9 deliver an automatic message drafted in advance of being sent, i.e. that of an SMS
10 message, to convey a telemarketing communication to Plaintiff. SMS blasting
11 platforms are man-made humanly contrived programs which allow companies to
12 blast out such messages via non-spontaneous methods, i.e. automated methods
13 similar to that of an assembly line in a factory. Such SMS blasting devices are
14 incapable of spontaneity, as they must be programmed by the operator to
15 automatically send messages out, *en masse*, pursuant to preprogrammed
16 parameters.

17 25. Accordingly, Defendant's messages utilized an "artificial voice" as
18 prohibited by 47 U.S.C. § 227(b)(1)(A).

19 26. In Merriam Webster's Dictionary, "prerecorded" is defined as
20 "recorded in advance." "Recorded" is defined as "to set down in writing." The
21 text message sent to Plaintiff's cellular telephone via an SMS blasting platform
22 were set down in writing in advance by Defendant, whose employees wrote out the
23 standard automated messages that were to be sent to Plaintiff and other class
24 members, and by way of preprogrammed SMS blasting, entered the prerecorded
25 message into the SMS Blasting platform, and thereafter sent these messages
26 pursuant to scheduled blasts that were programmed by Defendant. Thus, Defendant
27 employed a text message as an instrument or medium of expression to deliver a
28 prerecorded message drafted in advance of being sent.

1 27. Thus, Defendant's messages utilized a "prerecorded voice" as
2 prohibited by 47 U.S.C. § 227(b)(1)(A).

3 28. The telephone number that Defendant, or Defendant's employees
4 and/or agents, called and texted were assigned to a cellular telephone service for
5 which Plaintiff incurs charges for incoming texts and calls pursuant to 47 U.S.C. §
6 227(b)(1).

7 29. Defendant's calls and texts constituted calls that were not for
8 emergency purposes as defined by 47 U.S.C. § 227(b)(1)(A).

9 30. Plaintiff is not, and was never, a customer of Defendant's services and
10 has never had any prior established business relationship with Defendant.
11 Accordingly, Defendant never received Plaintiff's "prior express consent" to
12 receive calls and/or texts sent using an automatic telephone dialing system or an
13 artificial or prerecorded voice on his cellular telephone pursuant to 47 U.S.C. §
14 227(b)(1)(A).

15 31. In multiple instances, Defendant placed unsolicited telemarketing
16 calls and messages to Plaintiff more than thirty days after Plaintiff had registered
17 his telephone number with the federal government's Do-Not-Call Registry, in
18 violation of the TCPA, 47 U.S.C. § 227(c)(5) and 47 C.F.R. § 64.1200(c).

19 32. Based upon Plaintiff's personal experiences of being called and
20 messaged by Defendant after being on the National Do-Not-Call Registry for years
21 prior to Defendant's initial call, and at all relevant times, Defendant failed to
22 establish and implement reasonable practices and procedures to effectively prevent
23 telephone solicitations in violation of the regulations prescribed under 47 U.S.C. §
24 227(c)(5).

25 **CLASS ALLEGATIONS**

26 33. Plaintiff brings this action on behalf of himself, and all others similarly
27 situated, as a member of the two proposed classes (together, "The Classes")

28 34. The class concerning automatic telephone dialing system ("ATDS")

1 or artificial or prerecorded voice violations (“ATDS Class”) is defined as follows:

2 All persons within the United States who received any
3 telephone calls or text messages from Defendant to said
4 person’s cellular telephone made through the use of any
5 automatic telephone dialing system or an artificial or
6 prerecorded voice who had not previously consented to
7 receiving such calls within the four years prior to the
8 filing of this Complaint through the date of class
9 certification.

10 35. The Class concerning National Do-Not-Call Registry violations
11 (“DNC Class”) is defined as follows:

12 All persons within the United States whose telephone
13 numbers were registered on the National Do-Not-Call
14 Registry for at least 30 days, who had not granted
15 Defendant prior express invitation or permission, nor had
16 a prior established business relationship with Defendant,
17 or who had revoked such invitation or permission or prior
18 business relationship, who received more than one
19 solicitation call made by or on behalf of Defendant within
20 any 12-month period, within the four years prior to the
21 filing of this Complaint through the date of class
22 certification.

23 36. Plaintiff represents, and is a member of, the ATDS Class and the DNC
24 Class.

25 37. Defendant, its employees and agents are excluded from The Classes.
26 Plaintiff does not know the number of members in The Classes, but believes The
27 Classes’ members number in the thousands, if not more. Thus, this matter should
28 be certified as a Class Action to assist in the expeditious litigation of the matter.

38. The Classes are so numerous that the individual joinder of all of their
members is impractical. While the exact number and identities of The Classes’
members are unknown to Plaintiff at this time and can only be ascertained through
appropriate discovery, Plaintiff is informed and believes and thereon alleges that
The Classes include thousands of members. Plaintiff alleges that The Classes’

1 members may be ascertained by the records maintained by Defendant.

2 39. Plaintiff and members of The Classes were harmed by the acts of
3 Defendant in at least the following ways: Defendant illegally contacted Plaintiff
4 and The Classes' members via their cellular telephones thereby causing Plaintiff
5 and The Classes' members to incur certain charges or reduced telephone time for
6 which Plaintiff and The Classes' members had previously paid by having to retrieve
7 or administer messages left by Defendant during those illegal calls, and invading
8 the privacy of said Plaintiff and The Classes' members.

9 40. Common questions of fact and law exist as to all members of the
10 ATDS Class which predominate over any questions affecting only individual
11 members of the ATDS Class. These common legal and factual questions, which
12 do not vary between ATDS Class members, and which may be determined without
13 reference to the individual circumstances of any ATDS Class members, include,
14 but are not limited to, the following:

- 15 a. Whether, within the four years prior to the filing of this Complaint
16 through the date of class certification, Defendant made any call (other
17 than a call made for emergency purposes or made with the prior
18 express consent of the called party) to an ATDS Class member using
19 any automatic telephone dialing system or any artificial or
20 prerecorded voice to any telephone number assigned to a cellular
21 telephone service;
22 b. Whether Plaintiff and the ATDS Class members were damaged
23 thereby, and the extent of damages for such violations; and
24 c. Whether Defendant should be enjoined from engaging in such conduct
25 in the future.

26 41. As a person that received numerous calls and texts from Defendant
27 using an automatic telephone dialing system or an artificial or prerecorded voice,
28 without their prior express consent, Plaintiff is asserting claims that are typical of
The ATDS Class.

42. Common questions of fact and law exist as to all members of the DNC
Class which predominate over any questions affecting only individual members of

1 the DNC Class. These common legal and factual questions, which do not vary
2 between DNC Class members, and which may be determined without reference to
3 the individual circumstances of any DNC Class members, include, but are not
4 limited to, the following:

- 5 a. Whether, within the four years prior to the filing of this Complaint
6 through the date of class certification, Defendant made any solicitation
7 call to a DNC Class member more than one time in a 12-month period;
- 8 b. Whether Plaintiff and the DNC Class members were damaged
9 thereby, and the extent of damages for such violations; and
- 10 c. Whether Defendant should be enjoined from engaging in such conduct
11 in the future.

12 43. As a person that received more than one call from Defendant over a
13 12-month period after having their telephone numbers registered on the National
14 Do-Not-Call Registry for over thirty days, Plaintiff is asserting claims that are
15 typical of the DNC Class.

16 44. Plaintiff will fairly and adequately protect the interests of the members
17 of The Classes. Plaintiff has retained attorneys experienced in the prosecution of
18 class actions.

19 45. A class action is superior to other available methods of fair and
20 efficient adjudication of this controversy, since individual litigation of the claims
21 of all The Classes' members is impracticable. Even if every member could afford
22 individual litigation, the court system could not. It would be unduly burdensome
23 to the courts in which individual litigation of numerous issues would proceed.
24 Individualized litigation would also present the potential for varying, inconsistent,
25 or contradictory judgments and would magnify the delay and expense to all parties
26 and to the court system resulting from multiple trials of the same complex factual
27 issues. By contrast, the conduct of this action as a class action presents fewer
28 management difficulties, conserves the resources of the parties and of the court
system, and protects the rights of each member.

46. The prosecution of separate actions by individual members of The

1 Classes would create a risk of adjudications with respect to them that would, as a
2 practical matter, be dispositive of the interests of the other members not parties to
3 such adjudications or that would substantially impair or impede the ability of such
4 non-party members to protect their interests.

5 47. Defendant has acted or refused to act in respects generally applicable
6 to The Classes, thereby making appropriate final and injunctive relief with regard
7 to the members of The Classes as a whole.

8 **FIRST CAUSE OF ACTION**

9 **Negligent Violations of the Telephone Consumer Protection Act**

10 **On Behalf of Plaintiff and the ATDS Class**

11 48. Plaintiff repeats and incorporates by reference into this cause of action
12 the allegations set forth above at Paragraphs 1-47.

13 49. The foregoing acts and omissions of Defendant constitute numerous
14 and multiple negligent violations of the TCPA, 47 U.S.C. § 227(b)(1), and the
15 implementing regulations.

16 50. As a result of Defendant's negligent violations of 47 U.S.C. §
17 227(b)(1), Plaintiff and the ATDS Class members are entitled to an award of
18 \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C.
19 § 227(b)(3)(B).

20 51. Plaintiff and the ATDS Class members are also entitled to and seek
21 injunctive relief prohibiting such conduct in the future.

22 **SECOND CAUSE OF ACTION**

23 **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

24 **On Behalf of Plaintiff and the ATDS Class**

25 52. Plaintiff repeats and incorporates by reference into this cause of action
26 the allegations set forth above at Paragraphs 1-47.

27 53. The foregoing acts and omissions of Defendant constitute numerous
28 and multiple knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(b)(1),

1 and the implementing regulations.

2 54. As a result of Defendant's knowing and/or willful violations of 47
3 U.S.C. § 227(b)(1), Plaintiff and the ATDS Class members are entitled to an award
4 of \$1,500.00 in statutory damages, for each and every violation, pursuant to 47
5 U.S.C. § 227(b)(3)(B) and 47 U.S.C. § 227(b)(3)(C).

6 55. Plaintiff and the ATDS Class members are also entitled to and seek
7 injunctive relief prohibiting such conduct in the future.

8 **THIRD CAUSE OF ACTION**

9 **Negligent Violations of the Telephone Consumer Protection Act**

10 **On Behalf of Plaintiff and the DNC Class**

11 56. Plaintiff repeats and incorporates by reference into this cause of action
12 the allegations set forth above at Paragraphs 1-47.

13 57. The foregoing acts and omissions of Defendant constitute numerous
14 and multiple negligent violations of the TCPA, 47 U.S.C. § 227(c), and the
15 implementing regulations provided by 47 C.F.R. § 64.1200(c).

16 58. As a result of Defendant's negligent violations of 47 U.S.C. § 227(c),
17 Plaintiff and the DNC Class members are entitled to an award of \$500.00 in
18 statutory damages for each and every violation, pursuant to 47 U.S.C. §
19 227(c)(5)(B).

20 59. Plaintiff and the DNC Class members are further entitled to and seek
21 injunctive relief prohibiting such conduct in the future.

22 **FOURTH CAUSE OF ACTION**

23 **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

24 **On Behalf of Plaintiff and the DNC Class**

25 60. Plaintiff repeats and incorporates by reference into this cause of action
26 the allegations set forth above at Paragraphs 1-47.

27 61. The foregoing acts and omissions of Defendant constitute numerous
28 and multiple knowing and/or willful violations of the TCPA, 47 U.S.C. § 227(c),

1 and the implementing regulations provided by 47 C.F.R. § 64.1200(c).

2 62. As a result of Defendant's knowing and/or willful violations of 47
3 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled to an award of
4 \$1,500.00 in statutory damages for each and every violation, pursuant to 47 U.S.C.
5 § 227(c)(5)(B) and 47 U.S.C. § 227(c)(5)(C).

6 63. Plaintiff and the DNC Class members are further entitled to and seek
7 injunctive relief prohibiting such conduct in the future.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff requests judgment against Defendant for the following:

10 **FIRST CAUSE OF ACTION**

11 **Negligent Violations of the Telephone Consumer Protection Act**

12 **On Behalf of Plaintiff and the ATDS Class**

- 13 • As a result of Defendant's negligent violations of 47 U.S.C. § 227(b),
14 Plaintiff and the ATDS Class members are entitled to and request
15 \$500.00 in statutory damages, for each and every violation, pursuant
16 to 47 U.S.C. § 227(b)(3)(B);
17 • Injunctive relief prohibiting Defendant from engaging in such
18 conduct in the future; and
19 • Any and all other relief that the Court deems just and proper.

20 **SECOND CAUSE OF ACTION**

21 **Knowing and/or Willful Violations of the Telephone Consumer Protection Act**

22 **On Behalf of Plaintiff and the ATDS Class**

- 23 • As a result of Defendant's knowing and/or willful violations of 47
24 U.S.C. § 227(b), Plaintiff and the ATDS Class members are entitled
25 to and request treble damages of \$1,500.00, for each and every
26 violation, pursuant to 47 U.S.C. § 227(b)(3)(B) and 47 U.S.C.
27 §227(b)(3)(C);
28 • Injunctive relief prohibiting Defendant from engaging in such

conduct in the future; and

- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

On Behalf of Plaintiff and the DNC Class

- As a result of Defendant's negligent violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled to and request \$500.00 in statutory damages, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B);
- Injunctive relief prohibiting Defendant from engaging in such conduct in the future; and
- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

On Behalf of Plaintiff and the DNC Class

- As a result of Defendant's knowing and/or willful violations of 47 U.S.C. § 227(c), Plaintiff and the DNC Class members are entitled to and request treble damages of \$1,500.00, for each and every violation, pursuant to 47 U.S.C. § 227(c)(5)(B) and 47 U.S.C. § 227(c)(5)(C);
- Injunctive relief prohibiting Defendant from engaging in such conduct in the future; and

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- Any and all other relief that the Court deems just and proper.

Respectfully submitted on April 25, 2023.

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: s/ Todd M. Friedman
Todd M. Friedman
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